FILE COPY

MAY 5 1950

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1949

No. 802

BENNETT E. MEYERS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

BENNETT E. MEYERS, *Petitioner,*

v.

DONALD CLEMMER, Director, Department of Corrections, District of Columbia.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

STANLEY SUYDAM
JOHN O. DAHLGREN
Attorneys for Petitioner

DAHLGREN, DARRAGH & CLOSE
Of Counsel

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX TO PETITION FOR A WRIT OF CERTIORARI

Subjects

	PAGE
Statement of the Matter Involved	2
Statutes Relied Upon	4
Questions Presented	5
Reasons for Allowing the Writ	6
Conclusion	7
Appendix	8-11

Statutes

Section 2255, Title 28 of the United States Code	4
Chapter 25, Title 22, Section 2501 of the District of Columbia Code	4
Chapter 8, Title 16, Section 801 of the District of Columbia Code	5
Article I, Section 9, Clause 2 of the Constitution of the United States	5
Article III, Section 2, Clause 3 of the Constitution of the United States	5
The Fifth Amendment to the Constitution of the United States	5
The Sixth Amendment to the Constitution of the United States	5

INDEX TO BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Subjects

Opinion Below	12
Jurisdiction	12
Statement of the Case	13
Specifications of Errors	15
Preliminary Statement	17

PAGE

Argument

I THE LOWER COURT ERRED IN FAILING TO SUSTAIN PETITIONER'S CONTENTION THAT THE TRIAL COURT ERRED IN FAILING AND IN REFUSING TO PERMIT THE JURY TO PASS UPON ALL OF THE EVIDENCE BEARING UPON THE QUESTION OF FACT AS TO THE COMPETENCY OF THE TRIBUNAL, THUS VIOLATING PETITIONER'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY 17-24

II THE LOWER COURT'S OPINION IS SO PHRASED AS TO MAKE IT APPEAR THAT NO CONSTITUTIONAL QUESTION WAS PRESENTED TO THAT COURT BY PETITIONER'S MOTION TO VACATE SENTENCE UNDER SECTION 2255 OF TITLE 28 OF THE UNITED STATES CODE 24-32

III THE LOWER COURT ERRED IN SUSTAINING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IN DENYING APPELLANT'S MOTION TO VACATE SENTENCE UNDER SECTION 2255 OF TITLE 28 OF THE UNITED STATES CODE 32-39

IV THE SOLE BASIS FOR THE DECISION OF THE LOWER COURT IN SUSTAINING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO VACATE SENTENCE IS THE LOWER COURT'S USURPATION OF THE FUNCTION OF THE JURY, IN FINDING AS A FACT, FROM THE EVIDENCE, THAT THERE WAS A QUORUM PRESENT ON OCTOBER 4, 1947 ..... 40, 41

V THE LOWER COURT ERRED IN SUSTAINING THE ACTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IN DISMISSING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS .. 41-44

PAGE

VI PETITIONER'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY WAS VIOLATED BY THE TRIAL COURT'S INSTRUCTIONS WHICH PREVENTED THE JURY FROM CONSIDERING THE EVIDENCE AS TO THE "COMPETENCY OF THE TRIBUNAL", UPON THE 4TH OF OCTOBER AND UPON THE 6TH OF OCTOBER SEPARATELY 44, 45

Conclusion 47, 48

Table of Cases

Baker v. *Hudspeth*, 129 Fed. 2d 779 36
Bayless v. *Johnston*, 48 Fed. Supp. 758, 760 37
Christoffel v. *United States*, 338 U. S. 84, 93 L. Ed. 1349 ..... 13, 19, 24, 35, 37, 38, 40, 41, 45
Dorsey v. *Gill*, 148 Fed. 2d 857 37
Eury v. *Huff*, 141 Fed. 2d 554, 555 36
Graham v. *Squier*, 132 Fed. 2d 681, 683 37
Griffith v. *United States*, 93 L. Ed. 785 43
Hodges v. *Easton*, 106 U. S. 408, 27 L. Ed. 169 36
Johnson v. *United States*, 225 U. S. 405, 56 L. Ed. 1142 43
Johnson v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 .... 36, 38
Kenion v. *Gill*, 155 Fed. 2d 176, 179 37
In The Matter of John Mayfield, 141 U. S. 107, 35 L. Ed. 635, 638 36
McDonald v. *Johnston*, 62 Fed. Supp. 830, 831 37
Meyers v. *United States*, 84 U. S. App. D. C. 113, 171 Fed. 2d 812 ..... 13, 19, 20, 28, 40, 46
Meyers v. Welch, 179 Fed. 2d 707 25
In The Matter of Hans Nielsen, 131 U. S. 176, 33 L. Ed. 118 36
Sanders v. *Brady*, 57 Fed. Supp. 87, 91 36
Sunal v. *Large*, 332 U. S. 175 37
Wade v. *Hunter*, 72 Fed. Supp. 755, 760 37
Warring v. *Colpoys*, 74 App. D. C. 303, 122 Fed. 2d 642 37
Wood v. *United States*, 128 Fed. 2d 265, 277 36

PAGE

Statutes

Section 2255, Title 28, United States Code 24, 26, 27, 32, 42, 43, 47, 48
Title 16, Chapter 8, Section 801, District of Columbia Code 14, 16, 42, 44, 47
Title 22, Section 2501, District of Columbia Code 33

ERRATA

1. The case of *Meyers* v. *United States* as it appears in the Index at page III and upon pages 3-4 of the Petition for Certiorari and upon pages 13 and 40 of the Brief is incorrectly cited. The correct citation is "84 U. S. App. D. C. 101, 171 Fed. 2d 800".

2. In the first line of the first paragraph of the brief beginning on page 21, for the words "Senator Brewster" substitute "Mr. Rogers".

Supreme Court of the United States

October Term, 1949

No. .....

BENNETT E. MEYERS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

BENNETT E. MEYERS, *Petitioner,*

v.

DONALD CLEMMER, Director, Department of Corrections, District of Columbia.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Bennett E. Meyers prays that a writ or writs of certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 10, 1950 on appeal from decisions and orders of the United States District Court for the District of Columbia as will more fully appear hereinafter.

I

STATEMENT OF THE MATTER INVOLVED

The petitions for certiorari herein are directed to two decisions of the United States District Court for the District of Columbia, as affirmed by the Court of Appeals for the District of Columbia Circuit. The first of these decisions was entered by the District Court on August 2, 1949 in the case of *The United States of America* v. *Bennett E. Meyers,* Criminal No. 1414-47. In that case, your petitioner, Bennett E. Meyers, filed a "Motion to Set the Judgment Aside and to Discharge the Defendant", such being filed on July 1, 1949.

The second of these decisions is that of the United States District Court entered on October 24, 1949, dismissing a Petition for Habeas Corpus, which had been filed by your petitioner, in that Court, on October 5, 1949.

From both the first and second orders and decisions of the United States District Court, which have been referred to above, your petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit.

The subject proceedings were consolidated in the United States Court of Appeals for the District of Columbia Circuit, for argument and decision.

On April 10, 1950 the United States Court of Appeals for the District of Columbia Circuit affirmed the decisions and judgments of the Lower Court. This petition for a writ or writs of certiorari is to review the judgment or judgments of the United States Court of Appeals for the District of Columbia Circuit.

Bennett E. Meyers having been found guilty of subornation of perjury under Title 22, Section 2501 of the District of Columbia Code was sentenced by the United States District Court for the District of Columbia on

March 12, 1948 to confinement in the District of Columbia Reformatory at Lorton, Virginia, where at the time of filing of the Motion to Vacate Sentence, hereinbefore referred to, and at the time of the filing of the Petition for Habeas Corpus, hereinabove referred to, Petitioner was and still is being illegally deprived of his liberty by Donald Clemmer, Director of the Department of Corrections for the District of Columbia.

The cause or pretense of petitioner's illegal confinement and restraint is a judgment rendered and entered on March 12, 1948 by the District Court of the United States for the District of Columbia by and in which Court said petitioner was found guilty of subornation of perjury under Title 22, Section 2501 of the District of Columbia Code. The indictment upon which said judgment was entered alleged that the perjury which it was claimed petitioner had suborned had been given by one Lamarre on October 4, 1947 before an alleged Subcommittee of the Special Senate Committee to Investigate the National Defense Program. The indictment alleged that the said Subcommittee had been created by the Special Senate Committee and specifically relied upon the alleged Subcommittee as the "competent tribunal" before which the perjury was claimed to have been committed.

On March 15, 1948, petitioner was sentenced to imprisonment for a term of twenty months to five years. (Tr. pp. 391, 392) His motion for bail, being denied by the trial judge, he was forthwith committed to the District jail in Washington, D. C., and subsequently transferred to the District of Columbia Reformatory at Lorton, Virginia where he has since been confined and restrained of his liberty and where he now is.

Petitioner's appeal from the judgment of the District Court of the United States for the District of Columbia was dismissed by the United States Court of Appeals for the District of Columbia on November 8, 1948. (84 U. S.

App. D. C. 112, 171 F. 2d 811) Petitioner's application for a writ of certiorari was denied by the Supreme Court of the United States on February 14, 1949. (93 L. Ed. 480)

On July 1, 1949, petitioner filed in the United States District Court for the District of Columbia, the sentencing Court, a "Motion to Set the Judgment Aside and to Discharge the Defendant" such being filed under the provisions of Section 2255 of Title 28 of the United States Code.

On July 25, 1949 that Court denied said motion. (Tr. p. 431) From the action of that Court in that respect, petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. (No. 13067) Following the action of the Lower Court upon petitioner's motion to vacate sentence and following the action of the Lower Court in denying said motion, as aforesaid, petitioner, on October 5, 1949 filed a Petition for a Writ of Habeas Corpus to the Honorable Bolitha J. Laws, Chief Judge of the United States District Court for the District of Columbia. (No. 10,468) (Tr. p. 2A)

As has been stated, the United States Court of Appeals for the District of Columbia Circuit sustained the action of the United States District Court for the District of Columbia in (1) denying the Motion to Vacate Sentence and (2) in dismissing the Petition for a Writ of Habeas Corpus.

II

STATUTES RELIED UPON *

Section 2255, Title 28 of the United States Code.

Chapter 25, Title 22, Section 2501 of the District of Columbia Code.

---

* For full texts see Appendix.

Chapter 8, Title 16, Section 801 of the District of Columbia Code.

Article I, Section 9, Clause 2 of the Constitution of the United States.

Article III, Section 2, Clause 3 of the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States.

III

QUESTIONS PRESENTED

One of the questions presented for determination is whether or not the Court of Appeals erred in sustaining the action of the Lower Court in holding that neither petitioner's Motion to Vacate Sentence under Section 2255 nor his Petition for a Writ of Habeas Corpus, supported petitioner's contention that his fundamental constitutional right to trial by jury and to have a jury pass upon every single factual element of the statutory crime which formed the basis for the charge against him was violated by the trial court.

A further question is whether or not the Court of Appeals erred in sustaining the action of the Lower Court in holding that Section 2255 of Title 28 of the United States Code had the effect of repealing or superceding Section 801 of Title 16 of the District of Columbia Code which provides, in substance, that a person illegally restrained of his liberty may seek relief by Habeas Corpus.

The opinion and decision of the Lower Court is in conflict with the decision of this Court in the case of *Christoffel* v. *The United States,* 338 U. S. 84, 93 L. Ed. 1349.

The Lower Court in affirming the action of the United States District Court for the District of Columbia in denying petitioner's Motion to Vacate Sentence and in dismissing the Petition for a Writ of Habeas Corpus predicated its decision upon the sole proposition that the trial judge was justified in not permitting the jury to pass upon the question of the "competency" of the tribunal—that this was not a question of *fact* to be decided by the jury but, according to the Lower Court, this was a question of *law* for the Court, thus presenting the question as to whether or not the Lower Court's position in this respect is, as a matter of fact, supported by the record herein.

The situation, as presented by the opinion and decision of the Lower Court is that the trial judge was justified and warranted in keeping from the jury the evidence upon the question of fact as to whether or not the alleged members of the Subcommittee before whom the suborned testimony is said to have been adduced were, *as a matter of fact,* actually appointed to such offices by Senator Brewster and whether or not, if so appointed, they were *in fact* present on October 4th when the alleged suborned perjury is said to have been committed.

If it was the right of your petitioner to have the trial jury pass upon the question of fact, based upon evidence as to whether or not the alleged members of the Subcommittee were in fact appointed as such members, then the question of petitioner's Constitutional right to trial by jury is presented and must be decided.

IV

REASONS FOR ALLOWING THE WRIT

These cases involve and present a question of general importance relating to the construction of the statutes of the United States and the District of Columbia Code and to the Constitutional right of your petitioner to (a) trial

by jury (b) to a fair and impartial trial and (c) to due process of law required by Article III, Section 2, Clause 3, Amendments V and VI of the Constitution of the United States.

CONCLUSION

For the reasons stated herein and for those set forth in the Brief which accompanies this Petition, it is prayed that a writ or writs of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the final judgment or judgments of that Court above referred to.

Respectfully submitted,

STANLEY SUYDAM
JOHN O. DAHLGREN
1406 G Street, N. W.
Washington 5, D. C.
Attorneys for Petitioner

DAHLGREN, DARRAGH & CLOSE
Of Counsel

APPENDIX

Section 2255 of Title 28 of the United States Code. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of *habeas corpus.*

An application for a writ of *habeas corpus* in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained

if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Chapter 25, Title 22, Section 2501 of the District of Columbia Code:

Perjury—Subornation of Perjury

Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. Any such false testimony, declaration, deposition, or certificate given in the District of Columbia, but intended to be used in a judicial proceeding elsewhere, shall also be perjury within the meaning of this section.

Chapter 8, Title 16, Section 801 of the District of Columbia Code:

Petition—Sufficiency—Issuance of writ by court or justice.

Any person committed, detained, confined, or restrained from his lawful liberty within the District, under any color or pretense whatever, or any person in his or her behalf, may apply by petition to the District Court of the United States for the District of Columbia, or any justice

thereof, for a writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement, or restraint may be inquired into; and the court or the justice applied to, if the facts set forth in the petition make a prima facie case, shall forthwith grant such writ, directed to the officer or other person in whose custody or keeping the party so detained shall be, returnable forthwith before said court, or justice.

ARTICLE I, Section 9, Clause 2 of the Constitution of the United States:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

ARTICLE III, Section 2, Clause 3 of the Constitution of the United States:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Supreme Court of the United States

October Term, 1949

No. .....

BENNETT E. MEYERS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

BENNETT E. MEYERS, *Petitioner,*

v.

DONALD CLEMMER, Director, Department of Corrections, District of Columbia.

Respondent

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet officially reported. The text of such opinion will be found set forth at pages 467-470 of the Transcript of Record herein.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

STATEMENT OF THE CASE

Petitioner was tried for the crime of subornation of perjury before the United States District Court for the District of Columbia, and having been found guilty of the offense charged a judgment was rendered against him on March 12, 1948 and he was sentenced to imprisonment for a term of twenty months to five years under Title 22 of Section 2501 of the District of Columbia Code, being committed then to the District of Columbia jail in Washington, D. C. and, subsequently, transferred to the District of Columbia Reformatory at Lorton, Virginia. The indictment charged that petitioner had suborned the perjury of one Bleriot Lamarre before a Subcommittee of a Senate Committee, on October 4th and 6th, 1947.

From the judgment of conviction petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit, which Court reversed the conviction in respect of the perjury alleged to have occurred on October 6, 1947 but sustained the conviction in respect of the perjury alleged to have occurred on October 4, 1947 (*Meyers* v. *The United States*, 84 U. S. App. D. C. 113, 171 Fed. 2d 812). Thereafter, petitioner filed a Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, and this Court on the 14th day of February, 1948 denied said petition (93 L. Ed. 480). On the 27th day of June, 1949 this Court in the case of *Christoffel* v. *The United States* (338 U. S. 84, 93 L. Ed. 1349) under circumstances identical with those in the case involved, having granted a Petition for Certiorari, reversed the United States Court of Appeals for the District of Columbia Circuit.

On July 1, 1949 petitioner filed a Motion to Set the Judgment of Conviction Aside and to Discharge Defendant, (No. 10367) (Tr. p. 403). On October 5, 1947 petitioner filed a Petition for a Writ of *Habeas Corpus* under

Title 16, Chapter 8, Section 801 of the District of Columbia Code, (No. 10468) (Tr. p. 2A). On July 25, 1949 the United States District Court for the District of Columbia denied petitioner's Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code (No. 10367) (Tr. p. 489) and on October 24, 1949 the United States District Court for the District of Columbia dismissed petitioner's Petition for a Writ of *Habeas Corpus* (No. 10468) (Tr. p. 13A).

From the actions of the United States District Court, referred to above, petitioner appealed to the United States Court of Appeals for the District of Columbia and the appeals were consolidated by the latter Court for argument and decision (Tr. p. 466).

On January 20, 1950 argument was heard on both petitioner's appeals from the action of the United States District Court in denying petitioner's Motion to Vacate Sentence and in dismissing his Petition for a Writ of Habeas Corpus. (Tr. p. 467). On April 10, 1950 the United States Court of Appeals for the District of Columbia Circuit sustained the action of the District Court in refusing to grant petitioner relief (Tr. p. 467).

In both petitioner's Motion to Vacate Sentence and in his Petition for a Writ of *Habeas Corpus* it was the contention of petitioner that the Trial Court, in failing and in refusing to permit all of the factual elements of the statutory crime of which he was charged to go to the jury violated petitioner's constitutional right to trial by jury and to procedural due process of law, with the result that the judgment of conviction was void in that the Trial Court's action in this respect, so violating petitioner's constitutional rights, ousted that Court of jurisdiction. This was also the contention of your petitioner in the Lower Court.

SPECIFICATION OF ERRORS

The Court of Appeals erred in the following respects:

1. In affirming the action of the trial court in failing and refusing to permit the facts with respect of the question of the "competency" of the tribunal to be considered by the trial jury.

2. In treating the question as to whether or not the constitutional right of petitioner to have the trial jury pass upon all of the factual elements of the statutory crime of which he was charged, as a question of *law* and not a question of fact.

3. In so stating in its opinion, the facts upon which the Motion to Vacate Sentence and the Petition for Habeas Corpus were based as to render support for its opinion and decision that the error of the trial judge was one in respect to a question of *law* and not one of *fact* going to petitioner's constitutional right to trial by jury, to the equal protection of the laws and to due process of law.

4. In predicating its opinion and decision upon a *selected state of facts* not supported by the Motion to Vacate Sentence, the Petition for Habeas Corpus and the Record.

5. In so phrasing and in so wording its opinion as to make it appear, upon the face thereof, that its opinion and decision found record support.

6. In so stating some of the record facts as to afford color of correctness and validity to its opinion and decision.

7. In basing its opinion and decision upon its own prior statement or finding that a quorum of the Senate Subcommittee was present on October 4, 1947 when the evidence in respect of this fact adduced at the trial was not permitted by the trial judge to be considered by the jury.

8. In itself, sitting as an appellate tribunal, substituting itself in the original appeal from the judgment of conviction herein, for the trial jury in finding as a fact that a quorum of the Subcommittee was present on October 4, 1947 when the suborned perjurious statements are said to have been made and in predicating its present opinion and decision upon its own original error and usurpation of the function of the trial jury.

9. In stating in its opinion and basing its decision thereon that "the presence of three Senators at the Subcommittee hearing on October 4th, when Lamarre first testified was undisputed", and in stating and in predicating its opinion and decision upon such statement that "in the argument before us on the first appeal it was tacitly admitted" that three Senators were present some or all of the time on October 4th.

10. In stating in its opinion and in basing its decision thereon that "the contention was not as to the number of Senators present when Lamarre testified October 4th, but as to the validity of their appointment as members of the Subcommittee".

11. In lifting paragraph "25" of your petitioner's "Motion to Set the Judgment Aside and to Discharge Defendant" in Appeal No. 10367, from its context and in so doing placing an interpretation thereon which is diametrically opposed to the entire sense, import and substance of your petitioner's contentions in the Lower Court, particularly to paragraph "9" of such Motion.

12. In failing to hold and decide that Section 2255 of Title 28 of the United States Code did not supercede Chapter 8 of Section 16-801 of the District of Columbia Code which relates to relief in the District of Columbia by *habeas corpus.*

PRELIMINARY STATEMENT

In the interests of brevity and because of the manner in which the Lower Court undertook to dispose of the issues presented by petitioner's Motion to Vacate Sentence and by his Petition for *Habeas Corpus* it is found to be impracticable for petitioner specifically to address himself to each of the specifications of errors set forth above. However, the Court will find, set forth hereinafter, the arguments and the basis for petitioner's contentions which are the subject of the "Specification of Errors".

ARGUMENT

I

The Lower Court Erred in Failing to Sustain Petitioner's Contention That the Trial Court Erred in Failing and in Refusing to Permit the Jury to Pass Upon All of the Evidence Bearing Upon the Question of Fact as to the Competency of the Tribunal, Thus Violating Petitioner's Constitutional Right to Trial by Jury

The question presented to this Court by the Petition for a Writ of Certiorari is fundamental and is extraordinarily simple. However, the position taken by the trial judge, the Honorable Alexander Holtzoff, upon petitioner's Motion to Vacate Sentence and upon petitioner's Application for a Writ of *Habeas Corpus* has had the effect of beclouding the issue. At the hearing before Judge Holtzoff on July 22, 1949 upon petitioner's Motion to Vacate Sentence, in the course of the argument, Mr. Bushnell,* representing your petitioner, insisting that Judge Holtzoff in failing to let the evidence in respect of the *fact* of the competency of the tribunal go to the jury elicited from Judge Holtzoff the following: (Tr. p. 430)

---

* Deceased.

> "Well, you are referring to some instructions to the jury, but there was no evidence offered in behalf of the defendant in the Meyers case raising that issue, or controverting the Government's contention that a quorum was there, *and I did hold that the issue was irrelevant,* but it is also a fact that no evidence was tendered on that by the defendant."*

Following this cryptic but significant observation of the trial judge upon the occasion of the argument in support of the Motion to Vacate Sentence, Mr. Bushnell, representing your petitioner, said:

> "Your Honor flatly refused to instruct the jury that it was an essential element in the Meyers case."

In response to this categorical assertion by Mr. Bushnell, Judge Holtzoff replied:

> "*I did. I declined to so instruct the jury,* but I say before I declined to so instruct the jury no evidence was tendered on that issue in behalf of the defendant."*

Thereafter, Mr. Bushnell said to the Court:

> "I simply want to say in that connection, you can look this charge over from start to finish and there is nothing in there with reference to this point."

In response to the foregoing statement by Mr. Bushnell, Judge Holtzoff said:

> "*That is correct. I did not charge that.*"*

The Motion to Vacate Sentence reveals very clearly what actually transpired in connection with defendant Meyers' requests for instructions in the trial court and it clearly reveals that in point of actual fact the trial judge flatly failed and refused to permit the jury in a criminal case to consider the evidence of fact in respect of one of the *factual elements* of the statutory crime of which Meyers was charged. However, if doubt could exist as to whether

---

* Italics supplied.

or not what petitioner contends happened actually did happen, the answer is to be found in the admission of the trial judge (Holtzoff) that he failed and refused to let the *question of fact* as to the competency of the tribunal go to the jury, thus depriving Meyers of his constitutional right to trial by jury.

The most diligent search has been made by counsel for your petitioner but they have been unable to find a single reported case in which upon a Motion to Vacate Sentence, or otherwise, the very same judge who presided at the trial has admitted on record that he had failed to accord a person accused of crime his constitutional right to have a jury pass upon all of the factual elements of a statutory crime which had been charged.

The factual record as it existed in this respect when this case came before Judge Holtzoff on petitioner's Motion to Vacate Sentence likewise existed upon the original appeal from Meyers' conviction to the Court of Appeals of the District of Columbia Circuit. That Court, arrogating to itself the function of a trial jury, proceeded to reverse the conviction in respect of the alleged subornation of perjury on October 6th, because according to the appellate court *it was a fact* that no quorum of the Subcommittee was present on that date, *but then proceeded to find as a fact that there was a quorum present on October 4th.* Thus it sustained the judgment of conviction in respect of the perjury alleged to have been suborned on the latter day. *Meyers* v. *United States, supra.*

The "finding of fact", if it can be called that, made by the Court of Appeals of the District of Columbia Circuit in the appeal from the judgment of conviction, to the effect that a quorum of the Subcommittee was present on October 4th explains the observations made by Mr. Justice Murphy in footnote 4 to his opinion in the case of *Christoffel* v. *The United States, supra.* It does not appear from the opinion of the United States Court of Appeals for the District of Columbia Circuit in the case of *Meyers*

v. *The United States,* (*supra*) that the appellate court was clearly in error in not remanding the case to the trial court for a new trial. However, it *was* Meyers' contention that the right to trial by jury had been denied him in that the trial judge failed and refused to let the *factual* evidence as to the appointment, presence, capacity and "competency" of the "Sub-committee" of the Senate Committee, on October 4, 1947, to be passed upon by the trial jury.

The present opinion and decision, review of which is here sought, do not reflect even the bare substance of petitioner's Motion to Vacate Sentence or of his Petition for a Writ of Habeas Corpus, nor do the questioned opinion and decision refer to the position taken by appellant in his briefs, in which it was clearly contended that there had been a violation of Meyers' constitutional right to trial by jury.

Moreover, no reference whatsoever is made in the course of the opinion to the fact that the position taken by the Court was not even remotely contended for in either respondent's briefs or oral arguments.

Respondent did not claim that the question of the "competency" of the tribunal was a question of *law* for the trial court to decide. It did not take this position for the simple and obvious reason that the record of what transpired at the trial would not support it. In other words, respondent did not ask the appellate court to treat the question of the "competency" of the tribunal *as one of law* and not *one of fact.* Counsel for the respondent knew that the record herein disclosed that the following evidence directed to the *question of fact* as to what senators had been appointed to the Subcommittee was adduced through William P. Rogers. Rogers stated that the Chairman of the Special Committee had appointed Senator Ferguson Chairman of the Committee on April 19, 1947, that he knew that he, Ferguson, had been ap-

pointed at that time because "he told me that was the date he appointed him" (Tr. pp. 72-73.)

Moreover, Senator Brewster testified to the following facts—that he was not sure whether it was on July 18 "or a couple of days before that that they substituted Cain for Malone, and then just before October 4th, or *in that period,* Senator McGrath was substituted for Senator Hatch by the Chairman"—that Mr. Rogers did not know the exact date, "that there was no complete written record of the members of the Subcommittee who sat on October 4th or October 6th." (Tr. p. 73)

Senator Brewster's testimony (Tr. pp. 73-92) was directed to establish the following *facts*:

(a) That Senator Ferguson was the Chairman of the Committee.

(b) That the Subcommittee consisted of five members.

(c) That these five members were appointed, some as substitutes for others who were absent.

(d) That the Subcommittee members were, *as a matter of fact,* appointed under certain Senate resolutions and that, *as a matter of fact,* they had the power and authority to inquire into the matter of aircraft procurement.

Rogers likewise testified *as to facts* pertaining to the creation and the constitution of the Subcommittee. The jury was not permitted to consider the evidence. The jury was not permitted to decide whether or not *in point of fact* there was a Subcommittee, whether or not it consisted of five or of more members, who the members were, whether or not any of the members of the Subcommittee, including the chairman, were present on October 4, 1947, whether or not Rogers, who testified from memory, was correct, whether or not Senator Brewster, who likewise testified from memory, was correct in his assertions, whether or not Senator Brewster was correct in his recollection of what had transpired; and, *in point of actual fact,*

the jury was not permitted to consider the question of the veracity of Messrs. Rogers and Brewster.

In the face of these irrefutable facts as disclosed by the record, the Court of Appeals for the District of Columbia Circuit completely overlooked the violation of petitioner's constitutional right when the case was first before it on appeal from the judgment of conviction and *proceeded to consider and pass upon factual evidence* which was never submitted to the jury, and, substituting itself therefore, assumed to find that *in point of fact a quorum of the Subcommittee was present at all times on October 4, 1947.* Now the Lower Court assumes to predicate its present opinion and decision upon its prior error. In addition, the Court completely ignored what is so clear, that the question of the "competency" of the tribunal before which the alleged subornation of perjury was committed, while perhaps in part a question of law, *was in a vital and material respect, a question of fact for the jury.* The Court itself decided such vital *questions of fact,* as the fact of oral appointment and the fact of physical presence in the committee room at the time of the commission of the alleged suborned perjury.

If there could be the slightest doubt about it, that doubt is resolved by the testimony, on direct examination of the witness, Martin P. Smith, who was the shorthand reporter who transcribed the proceedings before the Subcommittee on October 4, 1947. The witness Smith was asked by the prosecution this question: (Tr. p. 97 *et seq.*)

> "Now will you examine your notes and testify what, if anything, they show with respect to what senators were present *when the hearing started* before the Committee on that morning (October 4th) prior to Mr. Lamarre being sworn in?" *

The witness Smith answered that there were present Senators Ferguson, Cain and McGrath.

---

* Italics supplied.

On cross examination Bushnell (for Meyers) asked the witness this question:

> "The mere fact that it is noted here at the beginning of the volume of testimony that Senators Ferguson, Cain and McGrath are present does not indicate that they were present throughout the day in that testimony, does it?"

To this question, the witness Smith responded:

> "Well, that again, the way you state it, the mere fact —well, the fact that their names are on the first page does not indicate that, no." (Tr. p. 101)

And later, Bushnell asked Smith this question:

> "Did you make any record of any of the senators who had been noted as being present at the beginning absenting themselves during the rest of the testimony?"

To this question the witness answered:

> "No."

And still later, Bushnell asked the witness Smith whether or not he had any recollection as to whether or not any of the senators who were noted as being present at the beginning of the proceedings had absented themselves, to which question the witness replied that he had no recollection at all. (Tr. p. 102)

From the foregoing, it is apparent that the question of the "competency" of the tribunal was not a bare legal question, but *one of fact* which the trial judge in the protection of the constitutional right of Meyers to trial by jury should have permitted the jury to pass upon. This he did not do and upon the original appeal to the Court of Appeals for the District of Columbia Circuit, that Court proceeded to substitute itself for the trial jury and to pass upon and to decide a question of fact based upon evidence *contrary* to the evidence as is so clearly established of record and in flagrant violation of Meyers' constitutional right to trial by jury. The Lower Court considered the question

as to whether or not the alleged suborned perjury was committed before a "competent tribunal" to be a *pure question of law*. This conclusion is not borne out by the record nor does it find any support in law. On the contrary, the admission of Judge Holtzoff upon the occasion of the argument before him upon petitioner's Motion to Vacate Sentence flatly refutes it.

If, to support a charge of perjury before a Senate Committee or Subcommittee, it is essential that at the time the alleged false statements are made there must, in *fact*, be a quorum present, as the Lower Court held in respect to October 6, 1947 in the original appeal to that Court in the *Meyers* case and as held by this Court in the *Christoffel* case, then it was essential that the Government prove, *as a fact*, the presence of a quorum on October 4, 1947, not only at the time Lamarre was sworn but also throughout Lamarre's entire testimony on that day. There was no such proof made by the Government in the course of the Meyers trial. Meyers had the right to have the jury consider all of the evidence in respect of the question of the presence of a quorum but this right was admittedly denied him by the trial judge.

II

The Lower Court's Opinion Is So Phrased as to Make It Appear That No Constitutional Question Was Presented to That Court by Petitioner's Motion to Vacate Sentence Under Section 2255 of Title 28 of the United States Code

The Lower Court, after stating the procedural background of the case, proceeded to state that the sentencing Court (Judge Holtzoff) denied petitioner's Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code upon the ground that the remedy provided by Motion to Vacate Sentence, being co-extensive with the remedy provided by *habeas corpus*, a collateral attack may

not be made by way of Section 2255 upon a judgment for mere errors of law committed in the course of a trial.

With the proposition that neither *habeas corpus* nor a Motion to Vacate Sentence may be resorted to by way of collateral attack to correct mere errors of law, petitioner may agree. However, it was the contention of petitioner upon the Motion to Vacate Sentence and on appeal therefrom that Meyers' constitutional right to trial by jury had been infringed by the trial court in failing and in refusing to permit all of the questions of fact comprising the essential elements of the statutory crime of which Meyers was charged to go to the jury, that this action violated Meyers' constitutional right to trial by jury and to procedural due process guaranteed by the Constitution of the United States.

Nowhere does the lower court advert to what was actually the position of your petitioner in that Court, but resorting to conjecture, surmise and speculation seems to avoid the question which was actually presented.

The Lower Court, in the course of its opinion, refers to the relief which Meyers sought in filing a Petition for a Writ of *Habeas Corpus* in the United States District Court for the Eastern District of Virginia and to the action of that Court and also to the action of the United States Court of Appeals for the Fourth Circuit, on appeal. The Lower Court in the instant case quotes from the opinion of Chief Judge Parker of the Fourth Circuit in *Meyers* v. *Welch* (179 Fed. 2d 707).

The Lower Court's references to the proceedings in the United States District Court for the Eastern District of Virginia and to those on appeal from that Court to the United States Court of Appeals for the Fourth Circuit do not reflect the actual facts. What actually transpired was that Meyers filed a Petition for a Writ of *Habeas Corpus* in the United States District Court for the Eastern District

of Virginia basing such petition upon the proposition that the trial court (Judge Holtzoff) violated Meyers' constitutional right to trial by jury in failing and in refusing to permit the jury to pass upon the facts in respect of the question of the "competency" of the tribunal. The Petition for a Writ of *Habeas Corpus* in that case maintained that the action of the trial court in this respect ousted that Court of jurisdiction and that its judgment was void.

All that the United States District Court for the Eastern District of Virginia decided in denying the Petition for *Habeas Corpus* was that that Court was prohibited by Section 2255 of Title 28 of the United States Code to entertain a Petition for *Habeas Corpus* "for the reason that the Motion of the appellant heretofore made (under Section 2255 of Title 28 of the United States Code), pursuant to said statute, before the United States District Court for the District of Columbia Circuit, to Vacate or Set Aside its Sentence of the applicant, was adequate and effective to test the legality of his detention by the defendant * * *".

Under this circumstance the sole question presented to the United States Circuit Court of Appeals for the Fourth Circuit, on appeal from the subject decision, was whether or not, in purview of Section 2255 of Title 28 of the United States Code, the subject Petition for a Writ of *Habeas Corpus* could be entertained by the United States District Court for the Eastern District of Virginia.

When the United States Circuit Court of Appeals for the Fourth Circuit sustained the Lower Court in that case it had disposed of the sole question presented by the appeal. It follows that the language of Chief Judge Parker, quoted by the Lower Court in its opinion in the instant case is *obiter dictum* and it can have no bearing upon the issue presented here.

The Lower Court in sustaining the United States District Court for the District of Columbia, both on the

Motion to Vacate Sentence and the Petition for a Writ of *Habeas Corpus,* says that the opinions of the United States District Court for the District of Columbia and of the United States Circuit Court of Appeals for the Fourth Circuit "fully cover the points at issue". Petitioner submits that these opinions do not cover the points at issue. Particularly is this true of the opinion of Judge Holtzoff in connection with the Petition for a Writ of *Habeas Corpus.* All that Judge Holtzoff decided in that case was that he had no jurisdiction upon a Petition for a Writ of Habeas Corpus filed under the provisions of the District of Columbia Code, in purview of the provisions of Section 2255 of Title 28 of the United States Code. Judge Holtzoff did not even profess to pass upon the merits of the issue as presented by the Petition for *Habeas Corpus* which was before him. The only question decided by Judge Holtzoff in connection with petitioner's Petition for a Writ of *Habeas Corpus* was that he had no jurisdiction to entertain such petition in view of the limitations of Section 2255 of Title 28 of the United States Code, which limitations, according to Judge Holtzoff, apply to all Federal Courts and therefore, according to him, likewise to the United States District Court for the District of Columbia even in a proceeding brought under the *habeas corpus* provisions of the District of Columbia Code.

Moreover, in the course of its opinion the lower court has this to say: *

> "But we pointed out these significant facts: Practically all Lamarre's testimony was given on October 4th, when a quorum was present; * * *"

Whether or not a quorum was present at the time Lamarre's testimony was given on October 4th *was a question of fact for the jury* but, as has been pointed out, Judge Holtzoff refused to permit the jury to consider the evidence and to decide whether or not a quorum was present.

---

* In the lower court's opinion upon the original appeal. No. 9797.

Aside from what the record discloses (see Meyers Requests for Instructions Nos. 51 and 52, Tr. p. 352, 353, and Judge Holtzoff's observations in denying such requests, Tr. p. 360) it is extremely important and interesting to note (what the Lower Court apparently overlooked) that in its brief in the original appeal (*Meyers* v. *The United States,* No. 9797 in the Lower Court) the respondent made this statement (Respondent's Brief, p. 18):

> "There was a quorum *at the time the witness was sworn.* No question was raised (before the Subcommittee) as to the lack of a quorum at any time *and from all that appears there may have been a quorum present at all times.* * * *"*

Later, in the same brief of the respondent the following appears: (Brief p. 26)

> "The Court instructed the jury that the Subcommittee of the Senate was a validly constituted tribunal as a matter of law * * *. This was concededly a question of law for the Court to determine. Therefore, it is immaterial whether the Court stated with precision the factual basis for its conclusion, *since the jury was bound by the instruction and was precluded from inquiring into the factual basis therefore."* *

Thus, it will be seen that the respondent found it impossible to find, within the four corners of the trial record evidence that as a matter of fact a quorum was present throughout the proceedings on October 4, 1947, despite the fact that the respondent had called the witnesses Rogers, Brewster and Smith in an attempt to sustain the burden of proof which was upon the prosecution, i. e., to establish to the satisfaction of the jury, beyond a reasonable doubt, the existence of the "competent tribunal" referred to in the District of Columbia Perjury Statute. Moreover, it will be seen that the respondent conceded that the trial judge's instruction stripped the jury of its func-

---

* Italics and parenthetical matter supplied.

tion of inquiring into the factual basis upon which the Government's contention in respect of the presence of a quorum was predicated.

It is indeed strange that the Lower Court overlooked these clear statements and admissions which were to be found in respondent's brief upon the original appeal and then to have recourse to its own memory of what Mr. Bushnell may have said, *arguendo,* in open Court on the original appeal.*

Having again asserted that a quorum of the Senate Subcommittee was present on October 4, 1947, the Lower Court proceeds to say that this fact was undisputed. There is nothing in the record to show that the fact of the presence of a quorum throughout October 4th was undisputed and the Court cites no authority for its statement. Quite the opposite is the fact.

Adding inference to innuendo, the Lower Court then proceeds to say, in its opinion, that the contention in the Lower Court on the original appeal was not as to the number of senators present when Lamarre testified on October 4th. Whatever the contention was on the original appeal (it is not admitted for one moment that Judge Holtzoff did not violate petitioner's constitutional right to trial by jury in failing to let the question of fact as to the "competency" of the tribunal go to the jury) upon Motion to Vacate Sentence or upon Petition for *habeas corpus,* your petitioner is not now bound or precluded from asserting and maintaining that in point of actual fact the trial judge's action in failing to let the jury consider the evidence as to whether or not a quorum was present is violative of his constitutional right.

The Lower Court, in the course of its opinion, says that its earlier statement as to what the question was on

---

* Such observations, if made, were and are not binding upon appellant in these proceedings.

the original appeal seems to be confirmed by paragraph "25" of petitioner's Motion to Vacate Sentence in case No. 10367. However, the Court has lifted paragraph "25" of the Motion to Vacate Sentence, out of context, and ignoring the record facts and the undisputed fact that the jury was not permitted to pass upon the question of fact as to the presence of a quorum of the Subcommittee on October 4, 1947, also ignores, among other things paragraph "9" of your petitioner's Motion to Set the Judgment Aside and to Discharge the Defendant (Tr. p. 404). Paragraph "9" of the Motion to Vacate Sentence reads as follows:

> "Although at the trial the fact was shown that no quorum of members of the special committee or of the subcommittee was present when the alleged false statements were made on October 4 and 6, 1947, the Trial Judge denied a motion for acquittal on that ground, *refused to permit the jury to consider the evidence and decide any question relative to a quorum*, decided that as a matter of law applicant had no right to show the non-existence of a quorum, and decided that the subcommittee was a competent tribunal, as required by the statute, without regard to the presence of a quorum." *

Paragraph "9" of the Motion to Vacate Sentence completely refutes the observations made by the Lower Court in respect of paragraph "25"** of the subject motion

---

* Italics supplied.

** The statement appearing in paragraph "25" of petitioner's Motion to Vacate Sentence was directed, *arguendo*, to the proposition that the Committee was a seven man committee and therefore, in context, the statement contained in that paragraph to the effect that Senators Ferguson, Cain and McGrath sat as a Subcommittee of the Special Committee, on October 4, 1947 is not opposed, nor was it intended to be opposed to the basic proposition, that the trial judge failed and refused to permit the jury to pass upon the question of fact as to whether or not there was physically present at the hearing on October 4th, a quorum which would give validity to the proceedings on that day.

as do defendant's Requests for Instructions, Nos. 51 and 52 (Tr. p. 352, 353) and Judge Holtzoff's observations in support of his denial of such requests (Tr. p. 360) and the observations quoted above from respondent's brief on the original appeal. (Appeal No. 9797 in the Lower Court)

It is by and as a direct result of the surprising and extraordinary observations of the Lower Court in its opinion that it was able to lay the predicate for the assertion that the question as to whether or not the tribunal was competent was a question of *law* for the court and not a quesion of *fact* for the jury.

By this process or method the Court found it unnecessary to make a single reference to defendant's Requests for Instructions, Nos. 51-52 (supra), to Judge Holtzoff's observations in denying such requests, to his instructions to the jury which clearly kept the question of fact as to the existence of a quorum on October 4th from the jury, to the admissions in respondent's brief on the original appeal (No. 9797) which have been noted above, to Paragraph "9" of petitioner's Motion to Vacate Sentence, to petitioner's briefs in case No. 10367, to the grounds stated in support of petitioner's Petition for a Writ of *Habeas Corpus* (in case No. 10468), and to the opposite categorical statements of present counsel for petitioner, made in open court, upon the occasion of the argument in both cases, review of which is here sought. These observations were clearly to the effect that it was the position of your petitioner that when Judge Holtzoff failed and refused to let the question of fact as to the "competency" of the tribunal, in all its various aspects, go to the jury he violated petitioner's constitutional right to trial by jury and thus ousted his Court of jurisdiction to render judgment and to predicate sentence thereupon.

In the light of the actual record in these cases, it is beyond the ability of your petitioner to comprehend the rea-

soning by which the Lower Court formulated its opinion and predicated its decision.

So far as petitioner knows all Federal Courts, whether upon Petition for Writ of *Habeas Corpus* or upon its modern prototype, i. e. Motion to Vacate Sentence, where the question of the legality of the detention of a person is the issue, have been zealous to safeguard and to protect such person's rights. They have never deviated from this course nor have they ever resorted to sheer technicalities in order to avoid giving the fullest possible consideration to the facts of the case, particularly where the issue, as here, is one having to do with constitutional rights. Never, so far as is known to your petitioner, has any Federal Court stood upon form and ignored substance in such a case. Never has any Federal Court failed to consider the ultimate facts and all of the ultimate facts in reaching a determination involving the constitutional rights of a citizen of the United States. In this case, however, the Lower Court appears to have ignored the precedents and these vital principles.

III

The Lower Court Erred in Sustaining the United States District Court for the District of Columbia in Denying Appellant's Motion to Vacate Sentence Under Section 2255 of Title 28 of the United States Code

The Trial Court, in which the Motion to Vacate Sentence was filed, in denying said Motion, stated, *inter alia,* that there had been no denial of a fair trial in the *Meyers* case and that therefore, a Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code, a remedy co-extensive with *habeas corpus,* would not lie.

Section 2501 of Title 22 of the District of Columbia Code, under which Petitioner was tried, convicted, and sentenced, provides that every person who, having taken an oath

> "before a competent tribunal, officer or person, in any case in which the law authorizes such oath,"

who, contrary to such oath, makes a false statement, shall be guilty of perjury.

The questions of fact which the jury, at Petitioner's trial, should have been allowed to determine, were:

(1) Whether or not the statements made before the Senate Committee by one Bleriot H. Lamarre were false.
(2) Whether or not Petitioner suborned these statements.
(3) Whether or not the tribunal before which Lamarre testified *was a "competent tribunal"* both as a matter of *law* and as a matter of *fact*, particularly whether or not a quorum was present on October 4th 1947.

There can be no doubt that the question as to whether or not the Senate Committee was a "competent tribunal" was a question of fact. If this is true, then the question arises, "Did the trial judge take from the jury one of the essential, factual elements of the statutory crime with which Meyers was charged?" That the Court did exactly this, is open to no doubt whatsoever.

Petitioner's requests for instructions Nos. 51 and 52, (Tr. p. 352, 353) were denied by the trial judge.

In reference to the denial of these two requests for instructions, the Court said, (Tr. p. 360):

> "The Court might say, in explanation of its ruling on No. 51 and No. 52, that if at the time a meeting of the subcommittee or committee is opened there is a quorum present, the mere fact that later on in the

course of the meeting one or more members absent themselves so that there is no quorum, that does not vitiate the proceedings. The only person who can raise the objection of no quorum present is one of the persons actually present.

"For instance, it is a matter of common knowledge that the Senate and the House frequently transact business when only a minority of members are present, and if some member present raises the point of no quorum, then further transaction of business must be suspended until a quorum is obtained; but unless some member present raises the objection that there is no quorum, no one else may raise that objection and the proceedings are valid.

"I am just saying that in explanation of my ruling on Requests No. 51 and No. 52."

In its charge to the Jury, the Trial Court made the following statements: (Tr. pp. 365, 372, 414, 415)

"*The only question before you to decide* is whether the defendant has committed the offense set forth in the indictment, namely, whether he has induced and procured Bleriot H. Lamarre to commit the crime of perjury. Your attention must be directed and concentrated on this one question and everything else is extraneous and should be laid to one side, except insofar as it throws a light or assists you in determining the question you have to decide.

• • • •

"Now the Court rules, *as a matter of law*, that the Committee and Subcommittee had jurisdiction to investigate these matters, and that Senator Ferguson, as the Chairman of the Subcommittee, had authority to administer oaths to witnesses who testified before the Subcommittee." *

In addition to the foregoing, the Trial Court Judge said that

---

* See pp. 8A, 9A of Joint Appendix in *Meyers* v. *Clemmer*, No. 10468 in this Court.

> "* * * the court holds that it is not open to anyone but one of the members present to raise the objection of no quorum and that objection must be raised at the time."

The jury was not permitted to consider the question as to whether or not the Senate Committee was properly constituted and, if so, whether or not there was a quorum present on the 4th and on the 6th of October, 1947, when Lamarre is alleged to have made his perjurious statement. That petitioner's position is sound, is manifest from the opinion of the Supreme Court of the United States in *Christoffel* v. *United States, supra.* Mr. Justice Murphy, delivering the majority opinion of the Court, said:

> "We are measuring a conviction of crime by the statute which defined it. As a consequence of this conviction, petitioner was sentenced to imprisonment for a term of from two to six years. An essential part of a procedure which can be said fairly to inflict such punishment is that all of the elements of the crime charged must be proved beyond a reasonable doubt."

After commenting upon the trial court's instructions to the jury, which allowed the jury to assume the competency of the committee, this Court said:

> "This not only seems to us contrary to the rules and practice of the Congress, but denies petitioner a fundamental right. That right is that he be convicted of crime only on proof of all of the elements of the crime charged against him."

The "fundamental right" which Mr. Justice Murphy referred to is the Constitutional right to trial by jury and to have a jury pass upon every single factual element of the statutory crime which forms the basis for the charge of crime.

We here have the extraordinary situation of the trial judge admitting that he did not permit the jury to pass upon the question of the competency of the tribunal. The

action of the trial judge deprived Meyers of his fundamental constitutional right and thus the very substance of fair trial was denied him. *Cf. Eury* v. *Huff*, 141 Fed. (2d) 554, 555.

The principles upon which Petitioner relies in support of his position will be found set forth in the cases of *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461; *In the Matter of Hans Nielsen*, 131 U. S. 176, 33 L. Ed. 118; and in numerous other decisions of the Federal Courts.

Among these cases are the following:

Sanders v. *Brady*, (Dist. Ct. Md.), 57 Fed. Supp. 87, 91.
In the Matter of John Mayfield, 141 U. S. 107, 35 L. Ed. 635, 638.
Hodges v. *Easton*, 106 U. S. 408, 27 L. Ed. 169.

In the *Hodges* case, this Court said:

> "The court could not, consistently with the Constitutional right of trial by jury, submit a part of the facts to the jury and itself determine the remainder without a waiver by the defendants of a verdict by the jury."

Wood v. *United States*, 128 Fed. (2d) 265, 277.
Baker v. *Hudspeth*, 129 Fed. 779.

In the *Baker* case, the Circuit Court of Appeals for the 10th Circuit said, (P. 781):

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process demanded by the 5th and 14th Amendments, and the failure to strictly observe these Constitutional safeguards renders a trial

and conviction for a criminal offense illegal and void and redress is within the ambit of habeas corpus."
Graham v. *Squier*, 132 Fed. (2d) 681, 683.
Dorsey v. *Gill*, 148 Fed. (2d) 857.
(See footnote appended in the left-hand column thereof at p. 873.)
Kenion v. *Gill*, 155 Fed. (2d) 176, 179.
Bayless v. *Johnston*, 48 Fed. Supp. 758, 760.
McDonald v. *Johnston*, 62 Fed. Supp. 830, 831.
Wade v. *Hunter*, 72 Fed. Supp. 735, 760.

The fact that the trial judge, (Holtzoff), violated Meyers' Constitutional right to trial by jury ousted the court of jurisdiction and its judgment is void. There can be no dispute regarding what transpired at the trial. Surely, the adjudicated cases fully support Petitioner's contention that under these circumstances *habeas corpus*, or a motion to vacate sentence are available remedies to correct this flagrant injustice.

What the proof regarding the competency of the tribunal was, is not a question here. Meyers had the absolute right to have the jury pass upon the question of fact as to the competency of the tribunal. He was deprived of that right.

The attack made by Petitioner upon the judgment against him is not such a "collateral attack" as was involved in the case of *Warring* v. *Colpoys*, 74 App. D. C. 303, 122 Fed. (2d) 642 and, therefore, the *Warring* case, referred to in the Opinion of the Lower Circuit which is quoted by the Lower Court, is not in point. The case of *Sunal* v. *Large*, 332 U. S. 175 is clearly distinguishable from the case at bar.

Petitioner insists that the decision of the Supreme Court in the *Christoffel* case, (*supra*), did not change the law but merely restated what has always been the law in respect of the question presented by the action of the trial judge. However, the *Christoffel* case brings the question presented by the *Meyers* case into sharp focus and demon-

strates beyond question that the grossest possible injustice was done to Meyers by the Trial Court.

In effect, the action of Judge Holtzoff, in failing and in refusing to let the question of fact as to the competency of the tribunal go to the jury, amounts to legislation by the Court. If the conviction in this case is permitted to stand, then we will have the extraordinary situation wherein a trial judge has created a new crime and has, in effect, enacted a new perjury statute in the District of Columbia, to the effect that one who makes a false statement is guilty of perjury whether or not such statement is made under oath or whether or not the oath-administering officer or "tribunal" had the power to administer such oath.

The District of Columbia Perjury Statute is clear and unambiguous. One of its essential requirements is that the false statement *must be made before a competent tribunal.*

The idea that this Court, in the *Christoffel* case, affirmed the decision of the United States Court of Appeals for the District of Columbia Circuit in the *Meyers* case, requires no answer, for the simple reason that such a conclusion is preposterous.

In the case of *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, this Court, considering the question as to whether or not the failure of the trial court to provide counsel for an accused person was such a jurisdictional prerequisite as to constitute a bar to a valid conviction, said, (U. S. 468, L. Ed. 1468):

> "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the 6th Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this Constitutional guaranty and whose life or liberty is at stake. If this requirement of the 6th

> Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus."

If the failure of a trial court, in a criminal case, to provide counsel for an accused person or to advise the accused of his right to counsel goes to the jurisdiction of the court, as this Court said in the *Johnson* case, (*supra*), then it is likewise true that the failure and refusal of the trial court in the *Meyers* case to permit the jury to pass upon every essential, factual element of the statutory crime of which Meyers was charged, was likewise the violation of a Constitutional right, i. e., the right to trial by jury, ousting the court of jurisdiction and making its judgment void.

The failure and refusal of the trial court to permit the jury to pass upon a single material question of fact constituting an essential part of the crime charged is tantamount to the complete elimination of the jury and thus, as observed by the Supreme Court in the *Johnson* case, (*supra*), such action constitutes a failure on the part of the trial court "to complete the court" as a jury, in a criminal case, which is not permitted to pass upon every essential, factual element of a statutory crime, is no jury at all.

The United States District Courts are Constitutional Courts. They can legally function only within the ambit of the powers conferred upon them by the Constitution of the United States. The Constitutional guarantees of the right to trial by jury and to procedural due process of law must be accorded all persons accused of crime in the United States. When these rights are infringed by United States District Courts in criminal trials, such infringement, as in the case here, ousts such courts of jurisdiction and their "judgments" are legal nullities and void.

IV

The Sole Basis for the Decision of the Lower Court in Sustaining the Trial Court's Denial of Petitioner's Motion to Vacate Sentence Is the Lower Court's Usurpation of the Function of the Jury, in Finding as a Fact, From the Evidence, That There Was a Quorum Present on October 4, 1947

The United States Court of Appeals for the District of Columbia Circuit in the original appeal from the judgment of conviction (U. S. Court of Appeals Case No. 9797, 84 U. S. App. D. C. 113, 171 Fed. 2d 812) undertook to decide as an original proposition, from the record which was before it, a question of fact which the Trial Court failed and refused to permit the jury to pass upon, i. e., whether or not there was a quorum of the Senate Subcommittee present on October 4, 1947 at the time Lamarre is said to have made the perjurious statements. Upon the basis of that finding of fact, by the appellate tribunal, the United States Court of Appeals for the District of Columbia Circuit affirmed Meyers' conviction in respect of the perjury alleged to have been committed by Lamarre before the Senate Subcommittee on October 4, 1947.

Heretofore, petitioner has referred to this startling procedure and has stated that under the circumstances of this case the Lower Court was not authorized to assume to discharge the functions of the trial jury. No stronger support may be found for petitioner's criticism of the Lower Court's action in this respect than to refer this Court to its own action in reversing that same Court in the case of *Christoffel* v. *The United States* (338 U. S. 84, 93 L. Ed. 1349). In that case, under circumstances parallel to those obtaining here, this Court reversed the Lower Court and Christoffel was accorded a new trial. This Court, in the *Christoffel* case, did not undertake to itself decide the question of fact as to whether or not a quorum was present but remanded the case so that Christoffel

would have a fair trial before an impartial jury in respect of all of the facts including the essential question of fact constituting one of the elements of the statutory crime of which he was charged, i. e., was the alleged perjury committed before a quorum of the Committee before which Christoffel is alleged to have perjured himself.

In the course of its opinion in the *Christoffel* case this Court said:

> "The heart of this case is that by the charge that was given it the jury was allowed to assume that the contentions of competency were satisfied *even though the basis in fact was not established and in fact of a possible finding that the facts contradicted the assumption* * * *. An essential part of a procedure which can be said fairly to inflict such punishment is that *all the elements of the crime charged shall be proved* (to the satisfaction of the trial jury) *beyond a reasonable doubt*".*

V

The Lower Court Erred in Sustaining the Action of the United States District Court for the District of Columbia in Dismissing Petitioner's Petition for a Writ of Habeas Corpus.

As appears from the statement of facts, *supra,* your petitioner on October 5, 1949 filed a Petition for a Writ of Habeas Corpus to the Chief Judge of the United States District Court for the District of Columbia (No. 10468) (Tr. p. 2A). On October 24, 1949, the United States District Court (by Judge Holtzoff) dismissed the petition (Tr. p. 452).

In the course of the proceedings before Judge Holtzoff on the occasion of the argument upon respondent's Motion to Dismiss the Petition for Habeas Corpus the Court

---

*Italics and parenthetical matter supplied.

stated, *inter alia,* from the bench, that Section 2255 of Title 28 of the United States Code had the effect of repealing or of superceding the right of an aggrieved person to apply for relief by Petition for a Writ of Habeas Corpus under Section 801 of Title 16 of the District of Columbia Code (Tr. p. 454-465). In other words, Judge Holtzoff held that Section 2255 of Title 28 of the United States Code had repealed, by inference, the Habeas Corpus provisions of the District of Columbia Code (Tr. p. 464).

One of the questions which is presented to this Court is whether or not Section 2255 of Title 28 of the United States Code, Judiciary and Judicial Procedure, which became effective September 1, 1948, has application to and controls the procedural steps provided for and available to persons restrained of their liberty, when recourse is had by them by *habeas corpus* under Chapter 8, Section 16-801 of the District of Columbia Code. As has been indicated, the *habeas corpus* judge was of opinion that the United States Code, being a statute of general application, was applicable to a *habeas corpus* proceeding instituted under the District of Columbia Code of Laws; whereas, it is the contention of petitioner that this is not the case. The Lower Court seems to have sustained this position.

Title 28 of the United States Code, effective September 1, 1948, repealed certain laws and parts of laws by specific enactment in this respect. The Court will find that Chapter 8, Section 16-801 of the District of Columbia Code was not repealed by the enactment of Title 28 of the United States Code.

It is axiomatic that penal statutes are to be strictly construed in favor of persons affected by them. It is also clear that where a statute specifically repeals certain other earlier enacted statutes, it does not repeal any statute not so specified unless the latter statute is diametrically opposed to and in conflict with earlier enacted statutes.

Moreover, the District of Columbia Code of Laws exists separately from the Federal or United States Code of Laws and cannot be said to have been amended or repealed by strictly Federal enactments which do not even purport to affect this separate body of statutory law. *Griffith* v. *United States,* 93 L. Ed. 785; *Johnson* v. *United States,* 225 U. S. 405, 56 L. Ed. 1142. In the latter case, the Supreme Court of the United States said:

> "There is no inconsistency of superseding or repealing effect by the Code of the District and the Criminal Code, regarding the latter as an Act of Congress passed after the District Code. Having definite territorial operation, they can exist together. And, as said by the Court of Appeals, a cogent reason for the conclusion that they were intended to exist together is found in the repealing provisions of the Criminal Code, which, in Chapter 15, enumerates in detail the provisions repealed, and no reference is made to the District Code."

Moreover, the Court should note that the *habeas corpus* judge (Holtzoff), who dismissed the subject-petition for *habeas corpus,* is the same judge who denied Petitioner's Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code and who, in the course of his opinion, pronounced from the Bench, in that case, said that *he had lost jurisdiction over the criminal case,* i. e., *United States of America* v. *Bennett E. Meyers,* No. 1414-47, (Tr. p. 435, No. 10367) in which case the motion to vacate sentence had necessarily been filed. In this, the *habeas corpus* judge's view of the matter, it is patent that the remedy available to Petitioner by motion to vacate sentence *was* inadequate and ineffective to test the validity of his detention. Further, in the *habeas corpus* judge's opinion from the Bench in the present case, as has been indicated, he reiterated that he had "lost jurisdiction to deal with the matter."

It is true that the United States District Court for the District of Columbia is one of the United States District Courts to which, in general, the provisions of Title 28 of the United States Code, Judiciary and Judicial Procedure, apply; but it is also true that the Congress, when it enacted Section 2255 of Title 28 of the United States Code, was aware of Chapter 8, Section 16-801 of the District of Columbia Code, and that if it had been the desire or intention of Congress to apply to *habeas corpus* proceedings in the District of Columbia, the restrictive provisions of Section 2255 of Title 28 of the United States Code, it would have repealed Section 16-801 of Chapter 8 of the District of Columbia Code, as it did amend the parallel provisions of the United States Code, as they existed prior to September 1, 1948.

It is the position of Petitioner that Section 2255 of Title 28 of the United States Code does not amend or supersede the *habeas corpus* provisions of the District of Columbia Code and that this being so, the lower court erred in sustaining the action of the District Court in dismissing the Petition for Writ of *Habeas Corpus* upon the ground that such would not lie in purview of Section 2255 of Title 28 of the United States Code.

VI

PETITIONER'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY WAS VIOLATED BY THE TRIAL COURT'S INSTRUCTIONS WHICH PREVENTED THE JURY FROM CONSIDERING THE EVIDENCE AS TO THE "COMPETENCY OF THE TRIBUNAL", UPON THE 4TH OF OCTOBER AND UPON THE 6TH OF OCTOBER SEPARATELY.

The failure of the Trial Court to permit the jury to consider the evidence in respect to the question of fact as to the "competency of the tribunal" resulted in Meyers'

conviction in respect of the alleged subornation of perjury on both the 4th and 6th of October, 1947. The United States Court of Appeals for the District of Columbia Circuit in the original appeal (No. 9797), substituting itself for the trial jury, reversed Meyers' conviction in respect of the alleged perjurious statements made on the 6th of October, because there was no quorum of the Subcommittee present on that day. The evidence of the alleged perjurious statements on both the 4th and 6th of October was offered by the prosecution without distinction as to these days. It follows, therefore, that the Lower Court upon the original appeal should have reversed the trial court's judgment of conviction because of the impossibility of segregating Lamarre's testimony as between the 4th and 6th of October. Mr. Justice Jackson in footnote 4 to his dissenting opinion in the case of *Christoffel* v. *United States, supra,* very clearly pointed out the importance of this question. Mr. Justice Jackson said:

> "Moreover, the Meyers jury was permitted to convict partly at least on the basis of testimony given before a Committee on October 6 when the *committee records showed, and the Government admits, that no quorum was present at any time.* Today's opinion is diametrically opposed to the Meyers conviction based on the October 4th testimony alone, but the Meyers conviction also rests in part on testimony before a body which demonstrably and admittedly *never* amounted to a quorum, while Christoffel's is reversed merely because the charge permitted the jury to ignore oral testimony "indicating" that a quorum once admittedly established may have evaporated. I do not see how the Court can justify such discrimination. The court below evidently could not, for it relied on the *Meyers* Case as a precedent for affirming the conviction of Christoffel on this identical issue."

In the case of *Christoffel* v. *United States* (U. S. Court of Appeals for the District of Columbia Circuit, 171 Fed.

2d 1004) the Lower Court in affirming the District Court relied upon the case of *Meyers* v. *United States,* (*supra*) and in its opinion (p. 1005) said:

> "Appellant offered evidence tending to show that a quorum was not present when he testified. Judge Curran refused to submit this question to the jury. Instead he gave the following instruction: '* * * If 13 members did meet at the beginning of the afternoon session of March 1, 1947, and thereafter during the progress of the hearing some of them left temporarily or otherwise and no question was raised as to the lack of a quorum, then the fact that the majority did not remain there would not affect, for the purposes of this case, the existence of that Committee as a competent tribunal * * *.'[1] In the circumstances of this case we think this ruling was right and a contrary ruling would have been narrowly technical.[2]"

In footnote No. "1" to its opinion the Lower Court made the following observation:

> "The record and briefs in *Meyers* v. *United States,* ..... U. S. App. D. C. ....., 171 Fed. 2d 800, (sic) show that Judge Holtzoff made a similar ruling in that case, D. C., 75 F. Supp., 486, and the point was raised on appeal."

The Lower Court in the *Christoffel* case, in sustaining the *Christoffel* conviction relied upon its earlier decision in the *Meyers* case. It will be seen from the observations of the Lower Court in the *Christoffel* case that it treated the *Meyers* and the *Christoffel* cases as identical. This Court reversed the Lower Court in the *Christoffel* case. Now, however, the Lower Court in its present opinion flatly contradicts its earlier statement as set forth above and says that the question of the "competency" of the tribunal was a question of *law* and not one of *fact,* thus avoiding the issue as to the question of the violation of Meyers' Constitutional right to trial by jury.

CONCLUSION

It is respectfully submitted that the Lower Court erred in sustaining the action of the District Court in (a), denying Petitioner's Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code and (b) in sustaining the District Court in dismissing petitioner's Petition for a Writ of *Habeas Corpus* under Section 16-801 of Chapter 8 of the District of Columbia Code.

Therefore, it is respectfully submitted that this Court should take the following action:

1. It should grant the Petiton for Certiorari in respect of petitioner's Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code (Case No. 10367 in the Lower Court) and should reverse the Lower Court in this connection, or

2. It should grant the Petition for Certiorari in connection with petitioner's Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code and should hear that case upon the merits, and

3. If this Court takes the action suggested in the paragraph hereof last preceding, it should grant the Petition for Certiorari in respect of the Lower Court's action in connection with petitioner's Petition for a Writ of Habeas Corpus (Case No. 10468 in the Lower Court).

4. If the Court takes the action suggested in paragraph "1" of the "CONCLUSION" hereof, it should deny the Petition for Certiorari in connection with petitioner's Petition for Habeas Corpus (Case No. 10468 in the Lower Court).

5. If the Court should deny the Petition for Certiorari in respect of petitioner's contentions upon the Motion to Vacate Sentence under Section 2255 of Title 28 of the

United States Code (Case No. 10367 in the lower Court), then the Court should grant the Petition for Certiorari and reverse the Lower Court in respect of petitioner's contention that Section 2255 of Title 28 of the United States Code, does not supersede the *habeas corpus* provisions of the District of Columbia Code. (Case No. 10468 in the lower Court).

Respectfully submitted.

STANLEY SUYDAM

JOHN O. DAHLGREN
1406 G Street, N. W.
Washington 5, D. C.
Attorneys for Petitioner

DAHLGREN, DARRAGH & CLOSE
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 802

BENNETT E. MEYERS, PETITIONER

v.

UNITED STATES OF AMERICA AND DONALD CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Counts 1, 3, and 5 of a six-count indictment (R. 2–7) filed on December 19, 1947, in the District Court for the District of Columbia charged that Bleriot H. Lamarre, on October 4 and 6, 1947, gave false testimony, in three specified respects, before a subcommittee of a special Senate Committee to Investigate the National Defense Program, in violation of 22 D. C. Code (1940 ed.) 2501. Counts 2, 4, and 6 charged petitioner with having suborned the respective perjuries. Lamarre pleaded guilty to all three perjury counts (R. 368). Petitioner, following a trial by jury, was found guilty on all three subornation counts

888949—50

(R. 391) and was sentenced generally to imprisonment for from 20 months to five years (R. 391–392). On November 8, 1948, petitioner's conviction was affirmed, *Meyers* v. *United States,* 171 F. 2d 800 (C. A. D. C.), and on February 14, 1949, this Court denied a petition for a writ of certiorari, 336 U. S. 912.

On July 1, 1949, petitioner filed in the District Court for the District of Columbia, pursuant to 28 U. S. C. 2255, a motion to set aside his conviction on grounds presently to be mentioned (R. 403–427). This motion was denied on July 25, 1949 (R. 428–429), and petitioner noted an appeal (R. 429–430). On October 5, 1949, petitioner filed in the same court a petition for a writ of habeas corpus (R. 441–451) challenging the validity of his conviction on the same grounds as those on which the proceeding under 28 U. S. C. 2255 was based. On October 24, 1949, the habeas corpus petition was dismissed for the reason that it did not appear that the remedy by motion to vacate (appeal from the denial of which was then pending) was inadequate or ineffective to test the legality of petitioner's detention (see 28 U. S. C. 2255, last paragraph) (R. 452). Petitioner also noted an appeal from the latter order (R. 452–453). On December 16, 1949, the two appeals were ordered consolidated by the Court of Appeals (R. 466), and on April 10, 1950, both judgments of the District Court were affirmed (R. 471). The petition for a writ of

certiorari seeks review of the judgment of affirmance.[1]

The purpose both of petitioner's motion to have his conviction set aside and of his petition for a writ of habeas corpus was to take advantage, by a collateral attack on the judgment of conviction, of this Court's ruling in *Christoffel* v. *United States,* 338 U. S. 84, decided June 27, 1949, four months after the Court's denial of certiorari to review the judgment of the court below affirming petitioner's conviction (see R. 404 [paragraph 9], 425–426, 442–448). In the *Christoffel* case, the Court held that in a prosecution under 22 D. C. Code (1940 ed.) 2501—the same statute that petitioner and Lamarre were convicted of violating—it is necessary for the Government to prove, and for the jury to find under proper instructions, that at the exact time an allegedly false statement was made before a congressional committee, a

[1] In addition to the two proceedings in the District Court for the District of Columbia which we have mentioned, petitioner brought a habeas corpus proceeding, based on the same grounds relied on in the District of Columbia proceedings, in the District Court for the Eastern District of Virginia. The Virginia proceeding was brought after the District of Columbia court's denial of the motion under 28 U. S. C. 2255, but before the bringing of the habeas corpus proceeding in that court. The Court of Appeals for the Fourth Circuit affirmed an order denying the Virginia petition for habeas corpus, both on the ground that the availability of relief by motion to vacate under 28 U. S. C. 2255 precluded resort to habeas corpus, and also on the merits of the controversy. See *Meyers* v. *Welch*, 179 F. 2d 707. Petitioner did not seek review of the Fourth Circuit's judgment.

quorum, or majority, of the committee was present. An instruction that it would suffice for the jury to find that a quorum was in attendance when the committee was convened, provided no point was thereafter raised as to the lack of a quorum, was held to be erroneous. For the reasons which follow, we submit that the judgment below affirming the orders denying the motion to vacate petitioner's conviction and denying the petition for habeas corpus is correct.

The full subcommittee before which petitioner's codefendant, Lamarre, testified on October 4 and 6, 1947, consisted of five Senators (R. 52). According to the undisputed evidence of the Government, three of these Senators—Ferguson, Cain, and McGrath—were in attendance during Lamarre's testimony on October 4th (R. 24, 52), and two—Senators Ferguson and Cain—were present during Lamarre's testimony on October 6th (R. 52). Petitioner, following the close of the evidence, asked the court to instruct the jury that "there must have been present at least three members of that subcommittee physically in the committee room" when Lamarre gave his alleged false testimony, in order to find petitioner guilty (Requested Instructions 51 and 52, R. 352–353). The court declined to give these instructions (R. 360), remarking that "The only person who can raise the objection of no quorum present is one of the [subcommittee members] actually present" (*ibid.*). However, petitioner

did not rely on the refusal of the court to give these requested instructions, or their substance, either on his appeal to the Court of Appeals or in his petition for certiorari in this Court.

In challenging, in the Court of Appeals, the "competency" of the subcommittee before which Lamarre testified, petitioner distinguished between the two days—October 4 and 6, 1947—on which Lamarre's testimony was given. His attack on the competency of the subcommittee which sat on October 4th was based on a claim that two of the three Senators concededly present and purporting to act as members of the subcommittee on that day (Senators Ferguson and Cain) had never validly been appointed to the subcommittee because, it was argued, they had never validly been appointed even to the full committee. His attack on the competency of the subcommittee which sat on October 6th (Senators Ferguson and Cain alone; see *supra,* p. 4) was based on the same ground and on the independent ground that, even if they were qualified members of the subcommittee, they constituted less than a quorum.[2] The Court of Appeals accepted petitioner's contention that the subcommittee that sat on October 6th was not

[2] See pp. 25–26, 34–45 of petitioner's brief in the Court of Appeals on his original appeal from his conviction, a copy of which is filed herewith for the Court's consideration.

"competent" because, according to the undisputed evidence, less than a quorum were present on that day, but rejected the above-mentioned argument whereby petitioner sought to show the incompetency of the subcommittee that sat on October 4th. The court said (171 F. 2d 800, 811–812):

> * * * On October 6, 1947, however, only two senators were present at the hearing. Since they were a minority of the subcommittee, they could not legally function except to adjourn. For that reason, the testimony of Lamarre given on that day cannot be considered as perjury nor can appellant be convicted of suborning it.
>
> But practically all Lamarre's testimony was given on October 4, when a quorum was present. The proceedings of that day contain the perjurious statements described in all three counts, and his examination on October 6 was largely repetitious.

In his petition for a writ of certiorari to review this judgment (No. 467, October Term, 1948), petitioner renewed his challenge of the competency of the subcommittee that sat on October 4th, but the argument was based, as in the Court of Appeals, on the alleged legal disqualification of Senators Ferguson and Cain (two of the three Senators admittedly present) to sit as subcommittee members (see pp. 2, 9, 10, 16, 20, 21–22, 30–31, 36–37). He still did not rely

on the trial court's refusal to grant the two requested instructions referred to above.[3]

Thus, what we may conveniently refer to as the *"Christoffel"* point—*i. e.*, that the jury must be instructed, in a prosecution under 22 D. C. Code (1940 ed.) 2501, that, to convict, they must find the alleged false statements to have been made before a "competent" tribunal, which, in the case of a congressional committee or subcommittee, must consist of at least a quorum, physically and actually present at the very time the false statements are made—was, though latent in petitioner's trial, never pressed by him either on his appeal to the Court of Appeals or in his petition for certiorari in this Court. In these circumstances, the instant proceedings are governed, as recognized by the court below (R. 469), by the principle that neither habeas corpus nor a motion to vacate under 28 U. S. C. 2255[4] may be resorted to for the purpose of correcting trial errors that

[3] It is true that petitioner mentioned the trial court's denial of these requested instructions in his "Summary Statement of the Matter Involved," at page 8 of the petition for certiorari. But that he did not rely on this as a reason for granting certiorari is clear from his failure to include any reference to the order of denial among the "Questions Presented" (former Pet. 2), the "Specification of Errors" (*id.* 20), the "Reasons for Allowance of the Writ" (*id.* 14–18), or the "Argument" (*id.* 23–41, especially at 29–37).

[4] The scope of review of a conviction under 28 U. S. C. 2255 is coextensive with the scope of review of a conviction in a habeas corpus proceeding. See *Meyers* v. *Welch*, 179 F. 2d 707, 708 (C. A. 4), and cases cited.

do not affect the court's jurisdiction. *Sunal* v. *Large,* 332 U. S. 174; see also *Warring* v. *Colpoys,* 122 F. 2d 642 (C. A. D. C.), certiorari denied, 314 U. S. 678.

In the *Sunal* case, Sunal and Kulick, in prosecutions for refusing to submit to induction under the Selective Training and Service Act of 1940, were denied leave to adduce evidence at their trials tending to show that their selective service classifications were invalid, even though they had exhausted their administrative remedies in this respect. They were convicted, and did not appeal. Thereafter, this Court, in *Estep* v. *United States,* 327 U. S. 114, held on comparable facts that a defendant in such circumstances had a right to adduce evidence tending to show that his classification was invalid. Sunal and Kulick then sought to avail themselves of the *Estep* holding by bringing habeas corpus proceedings challenging their convictions. This Court held, however, that the trial courts' errors could not be thus corrected. The Court said (332 U. S. at 182):

> An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Con-

stitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process.

The *Sunal* decision is thus on all fours with the case at bar. Indeed, to the extent that they differ on their facts, the difference is adverse to petitioner's position. For, whereas the trial errors in the *Sunal* cases had the effect of depriving Sunal and Kulick of their principal if not their only defense, the ruling at petitioner's trial—refusing to submit to the jury the quorum issue—was hardly prejudicial in view of the undisputed evidence that a quorum was present throughout Lamarre's testimony on October 4, 1947, which, under the decision of the court below affirming petitioner's conviction, sufficed to sustain the conviction.[8]

[8] It is true that the Court said, in the *Sunal* case, 332 U. S. at 181: "Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." This observation of the Court, however, is of no help to petitioner. For, as we have pointed out, though he appealed his conviction and sought certiorari in this Court, neither in the Court of Appeals nor in this Court did he raise the point—the "*Christoffel*" ruling—of which he now seeks to avail himself.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

JUNE 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950